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Nos. 95-779 and 95-259

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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16 pp

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 11
Holly Farms Corp. v. *NLRB*, 116 S. Ct. 1396 (1996) 10
McLeod v. *City of Newton*, Civ. A. No. CV-95-A-1573-S, 1996 WL 405738 (M.D. Ala. July 12, 1996) ... 3
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) 10
NLRB v. *Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995) 10
Pascutoi v. *Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975) 11
Smiley v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730 (1996) 13
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 10
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 10

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*:
29 U.S.C. 628 11
29 U.S.C. 630(b) 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 2, 3, 6, 7, 8, 10, 11, 12
42 U.S.C. 2000e(b) 1, 2, 3, 6, 9, 10, 11
Clean Water Act, 33 U.S.C. 1251 *et seq.* 10
Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* 2
29 U.S.C. 2611(3) 3
29 U.S.C. 2611(4)(A) 3
National Labor Relations Act, 29 U.S.C. 151 *et seq.* ... 10
29 U.S.C. 203(g) 3

Miscellaneous: Page

110 Cong. Rec. 13,088 (1964) 8
EEOC, *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966) .. 12
EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311 (Apr. 20, 1990) 11
Rev. Rul. 55-19, 1955-1 C.B. 496 9
S. Rep. No. 3, 103d Cong., 1st Sess. (1993) 3

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1. a. Respondents' principal argument (Resp. Br. 8, 9, 10-11) is that the Court should reject the EEOC's interpretation of the definition of "employer" in Title VII, 42 U.S.C. 2000e(b), because, in respondents' view, that interpretation renders meaningless the phrase "for each working day" which is contained

in the statutory definition.[1] That argument is incorrect. As we explain in our opening brief (EEOC Br. 22), the EEOC's interpretation gives meaning to that phrase: Because of the phrase, an employer is not covered by Title VII unless the employer has 15 or more employees on his payroll for *each working day* of 20 weeks in a year; it is not sufficient for the employer to have 15 different employees during the course of the entire week if he has fewer than 15 on his payroll for any day of the week.

Congress has, moreover, clearly demonstrated that it believes that the EEOC's interpretation gives meaning to the phrase. Congress included the same phrase in the definition of "employer" in the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.* The Senate Report accompanying that legislation stated that the definition of "employer" in the FMLA was intended to receive the same interpretation given by the EEOC to the "employer" definition in Title VII. The Report explained that "part-time employees and employees on leaves of absence would be counted as 'employed for each working day' so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to

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[1] Section 2000e(b) provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * *.

42 U.S.C. 2000e(b).

the end of the workweek, will not count as being employed on 'each working day' of such week." S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993).[2] See also *McLeod* v. *City of Newton*, Civ. A. No. CV-95-A-1573-S, 1996 WL 405738, at *3 (M.D. Ala. July 12, 1996) (adopting First Circuit's payroll interpretation in a Title VII case, specifically noting that "[t]he words 'for each working day' are not rendered superfluous" by the payroll interpretation).[3]

In fact, both the EEOC's and respondents' interpretations of Section 2000e(b) give meaning to the phrase "for each working day." Both require a determination of the number of employees that an employer "has" on each working day of a week. The difference is that the EEOC makes that determination by count-

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[2] Respondents contend (Resp. Br. 32) that, contrary to Congress's expressed intent, the payroll method of counting employees that is applied by the EEOC is not required under the FMLA. Respondents point to the fact that, in the FMLA, Congress used the phrase "employs * * * for each working day" rather than "has * * * for each working day." Compare 29 U.S.C. 2611(4)(A) with 42 U.S.C. 2000e(b). Respondents assert that, in light of the use of the verb "employ," which includes "permit[ting] to work," see 29 U.S.C. 2611(3) (referencing 29 U.S.C. 203(g)), the FMLA should be interpreted as counting only employees who are physically present at the work site. Resp. Br. 32-33. Both Section 2000e(b) and the employer definition in the FMLA, however, focus on the maintenance of an employment relationship by requiring that an employer "have" or "employ" a certain number of employees for each working day of the week. The payroll method of counting employees properly addresses that requirement.

[3] Respondents' suggestion (Resp. Br. 17-18) that petitioners' interpretation expands federal subject matter jurisdiction is based on their erroneous premise that petitioners' interpretation construes the definition of "employer" in Title VII more broadly than the statutory text permits.

ing the employees on the employer's payroll for each working day in that week, whereas respondents would take attendance for each working day in the week and then add to that total the number of hourly paid employees on paid leave on each working day, as well as any salaried employees not yet counted (including those on any type of leave).[4]

b. Respondents also claim (Resp. Br. 8, 12-16, 39-40) that petitioners applied the payroll method differently in the courts below and failed to give effect to the phrase "for each working day." Respondents point out that the weekly payroll summaries included in the record (J.A. 28-79) indicate the number of employees on respondents' weekly payroll. For purposes of that count, some employees, whose first or last day at work was in the middle of a week, were included in the count for each day of the week. Under the EEOC's payroll method, if any of those employees was added to or removed from the payroll in midweek, the employee should have been counted toward the daily employee count only on the days on which the employee was on the payroll. The summaries do not permit such a determination because they do not

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[4] Respondents do not address the irrationalities inherent in their counting method—*e.g.*, that hourly paid employees are treated differently from salaried employees; that some part-time employees are counted each day because they work a minimum amount of time each day whereas some full-time employees are counted for a lesser number of days despite the fact that they work significantly more hours in fewer days; that hourly paid employees on their regular day off are not counted on that day regardless of the fact that their employment relationship precludes them from working for a competitor on that day or that they must be available as a replacement employee if necessary on their off days.

indicate when an employee was added to or removed from respondents' payroll.[5]

The summaries in the record in this case are complete for purposes of applying the counting method that the parties were bound to apply below under existing Seventh Circuit precedent. The parties did not focus in the courts below on how to count employees who were added to or removed from respondents' payroll midweek. The EEOC's analysis of how to count employees focused on employees who were "maintained" on the employer's payroll for the given week and employees who were at work the day before their absence and expected to show up the following day, including two specific part-time employees who

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[5] Although respondents refer to "midweek employment changes," Resp. Br. 14 n.7, it is not clear from the summaries that those changes involved payroll changes. For example, the summaries show that James Frawley, a full-time employee, worked four or five working days during each of the first eight weeks of the calendar year and received five days of vacation pay during the ninth week. J.A. 28-36. He is not listed at all in the tenth week. J.A. 37. Mr. Frawley reappears on the first day of the eleventh week and is listed as working five days that week, as well as the first two working days of the twelfth week. J.A. 38-39. He is not listed at all in the thirteenth week. J.A. 40. In the fourteenth week, he is listed as working only on Monday, and that is the final record for him. J.A. 41. It is unclear from these summaries whether Mr. Frawley was on unpaid leave, but still on the payroll, during any part of the time he was not listed as working or on paid leave. It also is unclear, for example, whether during the twelfth week he was taken off the payroll after the two days he worked, or whether he remained on the payroll until the end of the twelfth week and was removed from the payroll for the thirteenth week, or whether he remained on the payroll without working during the thirteenth week and was removed from the payroll after his final day of work in the fourteenth week.

were on respondents' payroll for the entire year. See EEOC's Memorandum in Opposition to Defendant's Motion to Dismiss 2, 4, 5, 10, 11, 13-14, 15; EEOC C.A. Br. 5, 6-7, 9, 10, 13, 17 n.16, 21; J.A. 23. This focus did not lend itself to consideration of circumstances where an employee is added to or removed from the payroll midweek.[6] The facts of this case, moreover, do not require resolution of that issue. Even if every week involving a midweek employment change were excluded, the total number of weeks during which respondents had 15 or more employees for each working day would still exceed 20 weeks, making respondents "employers" within the meaning of Section 2000e(b).

c. Respondents urge (Resp. Br. 11-12) the Court to adopt their interpretation of Section 2000e(b) because they believe that it is the counting method that an employer "would probably adopt" if asked how many employees he has for each working day in a given calendar week. Respondents do not explain why they believe this to be true. Nor do they provide a reason for believing that an employer would use a counting method different from the method the employer would use to respond to the question of how many employees he has on a given day. Respondents concede, however, that the latter question would prompt an employer to use the payroll method of counting (see Resp. Br. 11). As respondents state in their brief, that "count would include each hourly-paid employee, *whether he*

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[6] When the issue of midweek changes in a payroll was mentioned on appeal, the EEOC discussed the FMLA approach and urged the same approach under Title VII, consistent with the EEOC's current interpretation. See EEOC C.A. Br. 17 & n.16.

worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day, Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tall[ies] would include each hourly-paid employee with whom the employer had an employment relationship without regard to the number [of] days or hours that employee actually worked during the week." *Ibid.* (emphasis added).[7]

2. Respondents assert (Resp. Br. 8, 18-30) that the legislative history surrounding the relevant phrases in the definition of employer in Title VII is sparse, but reveals a congressional intent to "count hourly-paid workers only when they actually work." *Id.* at

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[7] The one situation in which an employer might be prompted to use a different counting method is if he were simply asked whether he had 15 or more employees for a given week, without the qualifying phrase "for each working day" of the week. The employer would likely total the number of employees over the entire week without regard to which, or how many, employees worked on which days. For example, if an employer hired 25 inventory specialists on a one-time basis to conduct annual inventory and put them on the payroll for Monday and Tuesday, and the payroll returned to the employer's 10 regular employees on Wednesday, Thursday and Friday, the employer would respond that he had 15 or more employees that week. If, however, he were asked whether he had 15 or more employees for each working day of that week, his answer would be negative.

19.[8] The only statement they cite to support that assertion is a statement by Senator Humphrey that, once employers have more than 25 employees, "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." *Id.* at 26 (quoting 110 Cong. Rec. 13,088 (1964)). From this, respondents infer that Congress intended that only employees at work on a particular day should be counted because only those employees generate "income or output or * * * goods" on that day. *Ibid.* That interpretation is inconsistent with the court of appeals' ruling and respondents' own interpretation, both of which count salaried employees on all days regardless of their work schedules and count hourly paid employees on days that they are on paid leave. In both circumstances, those employees are counted on days that they do not generate any income, output, or goods. Moreover, respondents omit the second part of Senator Humphrey's statement, cited in our opening brief (EEOC Br. 31 n.22), explaining that employers with more than 25 employees "also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13,088 (1964). To the extent the size of an employer is based on the

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[8] Elsewhere, respondents claim (Resp. Br. 19-24), somewhat inconsistently, that, because Congress did not draft any committee reports, the legislative history of Title VII is of lesser authority and does not reflect the understanding of Congress. As we explain in our opening brief, this legislation was enacted under unique circumstances, attracted an exceptionally high level of attention, and engendered lengthy debate over its coverage provisions. See EEOC Br. 23-32, 25 & n.18. In such circumstances, statements during the floor debate, especially statements by the authors of the relevant provision, are as authoritative as a committee report.

fact that an employer with fewer employees has a more intimate, personal character, the relevant employees to be counted are those with whom the employer maintains an employment relationship, not those that report to work on a particular day.

Respondents expend (Resp. Br. 23-30) a significant amount of effort attempting to diminish the significance of Senator Dirksen's statement that his amendment of the definition of "employer," to apply where there are 25 or more employees "for each working day in each of twenty or more calendar weeks," was based on the federal unemployment compensation act. Respondents' assertions do not change the fact that, in 1964, at the time of enactment of Section 2000e(b), the settled administrative interpretation of the unemployment compensation act's "employer" coverage provision was set forth in Revenue Ruling 55-19, 1955-1 C.B. 496, *reprinted at* J.A. 80-85. That ruling interpreted an "employer" coverage provision to count, among the requisite individuals employed "on each of some 20 days during the taxable year," all "regular employees" who maintained an employment relationship with the employer, even on days when those employees are "absen[t] from duty" and "perform[] no physical service for the employer." J.A. 81. This interpretation was based on the conclusion that "the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week." *Ibid.* Respondents point to nothing in the unemployment compensation act referred to by Senator Dirksen, one of the authors of the statutory language

at issue here, to support the contrary interpretation they urge.

3. Respondents argue (Resp. Br. 33-40) that the Court owes no deference to the EEOC's interpretation of Section 2000e(b) because that provision defines the jurisdiction of the EEOC, and the EEOC cannot interpret its own jurisdiction. Agencies, however, necessarily must address questions concerning the scope of their jurisdiction under the statutes they administer. And this Court has repeatedly held that deference to agency interpretation is appropriate in that context, as exemplified by a line of cases deferring to the National Labor Relations Board's interpretation of the statutory definition of "employee" covered by the National Labor Relations Act. See *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1400-1402 (1996); *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 453-454 (1995); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985) (deferring to Corps of Engineers' interpretation of "waters of the United States" within the Corps' jurisdiction under the Clean Water Act as extending to certain wetlands).

In any event, as explained above and in our opening brief, the EEOC correctly interprets the statutory language in light of the statutory text and Title VII's overall structure, purpose, and history. The Court should adopt that interpretation based on the same factors and need not address any questions of deference. To the extent the Court finds Section 2000e(b) to be ambiguous, however, the EEOC's reasonable interpretation of that provision is entitled to deference.

Respondents also contend (Resp. Br. 35-36) that the EEOC's interpretation of Section 2000e(b) is not entitled to deference because the EEOC does not have authority "to promulgate rules or regulations." Respondents ignore the fact that the EEOC has explicit statutory authority to issue substantive regulations under the Age Discrimination in Employment Act of 1967 (ADEA), see 29 U.S.C. 628, and that the EEOC interprets the "employer" definition of the ADEA, 29 U.S.C. 630(b), which is identical in relevant respects to the "employer" definition in Title VII, in the same manner as it interprets Title VII's definition of "employer." See EEOC Br. 35 & n.24. That interpretation "is based on a permissible construction" of the identical statutory language and reflects "a reasonable policy choice for the agency to make," and thus warrants judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

Respondents err in stating that the EEOC's interpretation has not been consistent.[9] They compare the

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[9] Respondents also err in stating (Resp. Br. 37 n.23) that the EEOC did not cite the General Counsel opinions in the courts below. In contending in the court of appeals that the EEOC has formally and consistently interpreted the employer definitions in Title VII and the ADEA according to the payroll method, the EEOC cited not only its 1990 policy guidance, but also authority that had relied on two of the General Counsel opinions. See EEOC C.A. Reply Br. 17 n.12 (citing EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311 (Apr. 20, 1990)); *Pascutoi* v. *Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326 (D. Minn. 1975) (citing 1966 opinions of EEOC General Counsel stating "that the crucial test is how many employees are on the payroll during the

EEOC's 1990 policy guidance with a provision in an earlier investigator's manual regarding what type of information EEOC investigators should collect to determine whether an employer employed the requisite number of employees. That investigators' manual passage used the term "employ," and included an illustration discussing what employees "worked" each working day and how to count them. Respondents claim that the passage reflected an interpretation different from the payroll approach. The investigators' manual is not a good source for the EEOC's interpretation in this instance, however, because the manual applied to investigators in all jurisdictions in the country, including the jurisdictions in which there already was binding authority applying the daily attendance method. More significantly, the passage simply was not focused on the question whether presence on a payroll for a particular working day warranted being counted for that day, nor was it focused on the question of how to count an employee who is added to or removed from a payroll midweek. There is no suggestion that it was intended as an announcement of a departure from the EEOC's interpretation, which dated back to 1966, that "[t]he term 'employees for each working day' * * * refers to persons on the payroll and regularly employed, not to the number of persons at work on any given day." EEOC, *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966), citing a May 11, 1966, General Counsel opinion. In any event, even if the EEOC's interpretation of the definition of "employer" for purposes of Title VII and

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crucial 20-week periods and not how many are at work on a given day").

the ADEA had changed over time, that would not mean that judicial deference was not due the EEOC's present interpretation. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("mere fact that an agency interpretation contradicts a prior agency position is not fatal").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 1996

examination because hourly employees are counted only if their leave is paid. *Id.* Indeed, by reserving ruling on the questions raised by the day-by-day method -- how to count "hourly workers on paid leave," how to count "hourly paid workers on non-paid standby status," and how to count "salaried workers" -- even *Zimmerman* recognized that method's inherent additional complexities. 704 F.2d at 354 n. 6.

Therefore, it is difficult to understand how the plain text of the statute invokes a counting method that imports such significant and new concepts and facts into the phrase "for each working day."

e. The structural coherence of Title VII counsels in favor of the payroll method.

Next, the day-by-day method introduces a serious structural inconsistency into Title VII by excluding from the jurisdictional count employees who are explicitly protected by Title VII's prohibitions.

Title VII prohibits discrimination and retaliation against "individuals" and "employees." 42 U.S.C. §§ 2000e-2 & 2000e-3 (Pet. App. 22a-23a). Thus, all employees -- full-time or part-time, salaried or hourly, present or absent -- are protected from discrimination.

"[N]ormal canons of construction caution us to read [a] statute as a whole, and, unless there is good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 512 n. 5 (1992); *Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1066 (1995) (A term should be construed consistently throughout a statute.). *See also* Recent Case, *Employment Discrimination -- Title VII -- Seventh Circuit Reaffirms a Narrow Definition of "Employer" for the Purposes*

of Title VII, 109 Harv. L. Rev. 675 (1996).

In contrast, the payroll method is consistent and inclusive in counting employees, the workers protected under Title VII, for each working day they are employed.

Moreover, it makes no sense to exclude from the jurisdictional count the very persons whom Title VII was intended to protect. This is especially so when, as petitioner will demonstrate in the next section, those persons comprise an ever increasing proportion of the American workforce.

f. The day-by-day method does not account for the realities of the changing American labor market.

Next, contrary to the payroll method, the day-by-day method encrusts Title VII in a fixed view of the nature of employment in America -- in which workers go to the premises of the employer on Monday to Friday from 9:00 a.m. to 5:00 p.m. In fact, the American work environment is drastically changing so that the work patterns of employees are different than they were thirty years ago when Title VII was enacted. This case presents a snapshot of some of those changes.

First and foremost, women comprise a significant proportion of Metropolitan's workforce. That fact mirrors the economy in general. In 1970, there were 31.5 million women in the civilian labor force -- a participation rate of 43.3 per cent of American women. By 1994, that number had increased to 60.2 million women -- and their participation rate had increased to 58.8 per cent of women. Bureau of Census, *Table No. 627 - Civilian Labor Force and Participation Rates, With Projections: 1970 to 2005*, Statistical Abstract of the United States - 1995 at 405 (September 1995).

From 1960 to 1994, the participation rate of married women, broken down by age groups changed as follows:

Year	16-19	20-24	25-34	35-44	45-64	65+	Total
1960	27.2%	31.7%	28.8%	37.2%	36.0%	6.7%	31.9%
1980	49.3%	61.4%	58.8%	61.8%	46.9%	7.3%	49.8%
1994	48.9%	65.8%	71.6%	75.8%	61.9%	9.4%	60.7%

Id. at p. 405: *Table No. 636 - Labor Force Participation Rates, by Marital Status, Sex and Age: 1960 to 1994.*

Surely, this demonstrates the increased participation in the American workforce by one subset of Title VII's intended beneficiaries.

In addition, this case presents a picture of the changing nature of work schedules in our economy. Metropolitan's employees work flexible schedules with different hours on different days. There is flextime, part-time, and weekend work.

Those case-specific facts are reflected in national workforce statistics. For example, in 1985, the distribution of workers with flexible schedules was 12.3 per cent of a 73.4 million person workforce. By 1991. the distribution had increased to 15.1 per cent of an 80.45 million person workforce. *Id.* at p. 410: *Table No. 647 - Workers on Flexible and Shift Schedules: 1985 and 1991.*

There is no need for a more detailed statistical picture of the changed employment patternns in the American economy because the central point in this regard is a simple one: the construction of Title VII should not be encased in a outdated preconception of the American economy and working conditions. The analysis of the court of appeals in this case, and the day-by-day method in general, have just that undesirable effect. That construction excludes Title VII's

intended beneficiaries from its protections in an era when those beneficiaries are entering the American workforce in droves, a wholly undesirable result.

The payroll method has none of these unfortunate consequences. It looks only to one thing -- employment status -- without any unnecessary or outdated criteria about working conditions. It is flexible enough to cover all workers who enter the workforce. This is the type of flexibility that a remedial anti-discrimination statute should have.

g. The day-by-day method results in irrational distinctions between employees.

Furthermore, the day-by-day method results in irrational and arbitrary distinctions between workers. For example, an hourly worker who works a "regular" workday five days a week, Monday through Friday, is counted on all five days whereas an hourly worker who works longer hours only four days a week, Monday to Thursday, for the same total weekly hours is counted for only those four days. That pattern -- "flextime" -- exists in this case. (*See* discussion *supra*, p. 11).

Another example: the part-time worker who works four weekdays and one weekend day is not counted as an employee for the entire week. That pattern also exists in this case -- M. Finney, a part-time employee, often worked four days during the workweek and then on Saturday. (*See* discussion *supra*, pp. 11-12). In contrast, under both methods, a part-time employee who works only one hour a day all five days of the regular workweek would be counted for the whole week.

Yet another example: Respondent Bieber was a salaried employee and was thus counted for each working day without reference to his presence at work or leave status. (*See* discussion supra, p. 12). There seems to be no principled

reason to treat such salaried employees different from a full-time hourly employee.

Beside their obvious irrationality, these differences are the more suspect because nowhere does the statute mention, or distinguish between, employees on the basis of any of the factors needed to apply the day-by-day method.

h. Conclusion.

For all these reasons, the plain text of the statute requires that the payroll method be used to determine jurisdiction. The resolution of this case should begin and end with that rationale.

3. If Section 701(b) is ambiguous, the legislative history supports the payroll method.

a. Introduction

The distinguished Seventh Circuit panels in this case and in *Zimmerman* reached conclusions directly opposite to that of the distinguished First Circuit panel in *Thurber* which included then Circuit Judge, now Justice, Breyer. 717 F.2d at 633. That conflict is repeated in decisions of other circuit and district courts, several disagreeing about the meaning of the statute's "plain text." (*See* cases cited *supra*, notes 6 & 7, p. 17 & 18). Perhaps that conflict alone suggests that the statute is ambiguous, justifying a look at its legislative history.

Moreover, the court below herein seemed to concede both that the statute was ambiguous and that the legislative history supported the payroll method. At one point, the court "agree[d] that the statute could have been worded more clearly." 60 F.3d at 1228 (Pet. App. 6a). At another point, the court conceded that certain remarks in the legislative debate were consistent

with the payroll method. Yet, the court decided the case on the statute's plain text and concluded that the legislative history of Title VII was "too confused and chaotic to be of much use." 60 F.3d at 1227 n. 3 (Pet. App. 5a). Perhaps these are extraordinary circumstances sufficient to justify examination of the legislative history. *Estate of Cowart*, 112 S. Ct. at 2594 (In plain text case court examines legislative history only in most extraordinary circumstances.).

Petitioner Darlene Walters respectfully submits that the legislative history of the statutory language at issue is crystal clear in focusing on the existence of an employment relationship as determinative of an employee's inclusion in the jurisdictional count. Only the payroll method is true to that legislative history.

b. The 1964 legislative history of the Title VII contains a specific explanation of the purpose and meaning of the phrase "for each working day."

First, there is a specific legislative history about the definition of "employer" and the phrase "for each working day."

That phrase originated in the Senate which was considering a civil rights bill passed by the House of Representatives. The Title VII of that House-passed bill defined employer as a person with twenty-five or more employees, but did not include the "for each working day" language now in the statute. H.R. 7152, 88th Cong., 1st Sess. (1964). That language originated in a Senate substitute for Title VII, was specifically debated on the Senate floor, was approved by a large majority of the Senate, and thereafter survived without change into enactment as law.

Eight years later, Congress reduced the jurisdictional

minimum to the current fifteen, but the neither the text nor the legislative history of that change enlighten the meaning of the phrase "for each working day." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972).[9]

A brief synopsis of the 1964 Senate deliberations preceding the enactment of Title VII is as follows:

It is an understatement to say that this civil rights legislation was controversial. Once in the Senate it drew the earnest legislative attention of the Senate leaders, Majority Leader Mike Mansfield and Minority Leader Everett McKinley Dirksen.

After the passage of several weeks, Senators Mansfield and Dirksen jointly introduced a compromise substitute to the House Bill. Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted in full at* 110 Cong. Rec. 11926 (May 26, 1964). The ensuing Senate debate focused on Amendment

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[9] Both the House and Senate bills that formed the basis of the 1972 amendments proposed to lower the minimum to eight employees. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 26 (1971), and S. Rep. No. 415, 92 Cong., 1st Sess. 8-9 (1971). In the House that change was stricken entirely. *See* H.R. 1746, 92d Cong., 1st Sess. (1971) as passed by the House on September 17, 1971. The Senate compromised on a minimum of fifteen. *See* Senate debates, 118 Cong. Rec. 3170-72 (February 8, 1972). The Conference then agreed to the fifteen employee minimum. *See* Conference Report, S. Rep. No. 681, 92d Cong. 2d Sess. 15 (1972), and House debates adopting Conference approved bill, 118 Cong. Rec. 7563-73 (March 8, 1972), *esp.* remarks of Congressman Erlenborn at 118 Cong. Rec. 7567. Through all that activity, the meaning of "for each working day" was not discussed.

656, the Mansfield-Dirksen Substitute.

The compromise substitute contained the precise definition of "employer" that ended up in the statute, including the phrase "for each working day." *Id.* at 11930. On June 5, 1964, Senator Dirksen inserted into the Congressional Record an "annotated" copy of the House-passed bill showing the changes proposed by the Substitute. That annotated copy shows the addition of the phrase "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 110 Cong. Rec. 12807, 12812 (June 5, 1964).

On June 9, 1964, Senator Ervin, acting for Title VII's opponents, moved to strike Title VII in its entirety. 110 Cong. Rec. 13073-74 (June 9, 1964); Amendment 898, *reprinted in full at* 110 Cong. Rec. 12924-25 (June 8, 1964). The Senate soundly rejected that effort by a vote of 64 to 33. 110 Cong. Rec. 13085 (June 9, 1964).

Immediately thereafter, Senator Cotton of New Hampshire moved to raise the jurisdictional minimum to one hundred or more employees. Amendment No. 606, *reprinted in full at* 110 Cong. Rec. 11461 (May 20, 1964). See Remarks of Senator Cotton and ensuing debate, 110 Cong. Rec. 13085-93 (June 9, 1964).

In the course of that debate, and in opposition to the Cotton amendment, Minority Leader Dirksen specifically discussed the phrase "for each working day." After stating that he had initially been concerned with the "far-reaching character" of Title VII as contained in the House Bill, he explained that

> [a]ccordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect

> that the definition of the term "employer" would apply to 25 or more **who were employees for each working day**, in each of 20 or more calendar weeks, in the current or preceding calendar year. **We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.** 110 Cong. Rec. 13087 (1964) (emphasis added).

While Senator Dirksen's remarks were targeted at seasonal employees, the clear implications of what he said go much farther because they explicitly show his intention to focus on the existence of an employment relationship as determinative of the jurisdictional count. To repeat his words more pointedly: "the definition . . . would apply to 25 or more **who were employees on each working day** . . . ." (emphasis added). It is the status of workers as employees that is central, not their presence at work. Indeed, Senator Dirksen's remarks neither mention nor even remotely allude to presence at work.

Moreover, because of the statutory and interpretive history of the Unemployment Compensation Act (UCA), Senator Dirksen's remarks about the UCA and about his consultation with the Department of Labor "and others" even more strongly show his focus on the employment relationship as the determinant of coverage.

In 1964, the UCA's definition of "employer" read as follows: "[T]he term 'employer' does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were **employed by him in employment** for some portion of the day (whether or not at the same moment of time) was four or more." 26 U.S.C. § 3306(a) (1958) (emphasis added).

In 1955, the Internal Revenue Service ("IRS") had construed an earlier version of that definition which differed slightly from the above quoted form in that the minimum number of employees was eight. 26 U.S.C. § 1607(a) (1952).[10] The IRS ruled that a worker is counted as an employee under the UCA for each working day the employment relationship

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[10] The definition was originally enacted in the Social Security Act of 1935 and included the following language ". . . the total number of individuals who were **in his employ** for some portion of the day (whether or not at the same moment of time) was eight or more." Social Security Act of 1935, Pub. L. No. 74-271, Title IX, § 907(a), 49 Stat. 620, 642 (1935) (emphasis added).

In early 1939, the original definition was codified as 26 U.S.C. § 1607(a) as part of the Internal Revenue Code of 1939. Pub. L. No. 76-1, ch. 2, § 1607(a), 53 Stat. 1, 187 (February 10, 1939). Later that year, the language "in his employ" was changed to "employed by him in employment." Social Security Act Amendments of 1939, Pub. L. No. 76-379, title VI, § 614, 53 Stat. 1360, 1392 (August 10, 1939).

In August 1954, the definition was recodified as 26 U.S.C. § 3306(a). Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 3, 447 (1954). On September 1, 1954, the definition was amended to reduce the minimum number of employees to four, effective January 1, 1956. An Act to Extend and Improve Unemployment Compensation, Pub. L. No. 83-767, ch. 1212, §1, 68 Stat. 1130 (1954), *codified at* 26 U.S.C. § 3306(a) (Supp. II 1955). That was the form of the definition in 1964 when the Senate adapted it into Title VII.

In 1970, the pertinent part of the definition was amended into its current, slightly different, reconfigured form in which the number of employees was also reduced to one. Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695, 696 (1970), *currently codified at* 26 U.S.C. § 3306(a)(2) (1994).

exists, regardless of whether the employee reports to work each day. Rev. Rul. 55-19, 1955-1 C.B. 496 (1955).

The full text of that IRS Revenue Ruling is included in the Joint Appendix at JA 80 to JA 85. It seems written with the instant case in mind. It dealt explicitly with the "method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939) under certain conditions, particularly where part-time employees are involved." 1955-1 C.B. 496-97. (JA 80).

As the IRS ruling summarized the matter, neither the method or the frequency of payment, nor an employee's presence at work, nor an employee's "regular," "permanent" or "part-time" status determines the employee's inclusion in the count. Instead: "The existence of an employment relationship is the controlling factor." *Id.* at 498. (JA 83). Thus, explained the IRS, regular employees who are granted a day or two off per week because of long working hours are counted as employees during the entire week because the employer-employee relationship does not terminate on those days off.

> If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week. *Id* at 497. (JA 81).

This Ruling could not be clearer.

Moreover, the explicit language of the UCA through all its changes (from the original "individuals . . . in his employ" to "individuals . . . employed by him in employment," *supra* note 10 p. 35) show the Congressional focus on the employment relationship as the determinant of coverage.

Senator Dirksen and the other drafters of his compromise substitute were specifically aware of the text of the UCA and that long standing IRS ruling. We know this because he as much as said so in his remarks about "taking the language out of the [UCA]" and about consultation with the "Department of Labor and others, in order to make sure that we were on good ground." 110 Cong. Rec. at 13087. At the very least, as the district court in *Cohen v. S.U.P.A. Inc.* concluded, it is appropriate to assume that Congress intended that Title VII's definition be interpreted the same as the UCA's definition on which it was modeled. 814 F. Supp. at 255-56 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979)).

This is the most powerful and persuasive legislative history imaginable -- remarks in floor debate by the Minority Leader of the Senate, a chief co-sponsor of a compromise bill containing language that was eventually enacted into law without change. He spoke directly to the language at issue and his position was supported by a large majority of the Senate. *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.")).

The power of this legislative history is reflected in the Senate's overwhelming rejection of Senator Cotton's amendment by a vote of 63 to 34. 110 Cong. Rec. 13093 (June 9, 1964). The next day, Senator Dirksen introduced a revised substitute amendment that incorporated other changes made by the Senate but which did not alter his proposed definition of employer. Amendment No. 1052, *reprinted in full at* 110 Cong. Rec. 13310, 13314 (June 10, 1964). Almost immediately thereafter, the Senate voted cloture by a vote of 71-29. 110

Cong. Rec. 13327 (June 10, 1964). On June 17, 1964, the Senate adopted the Mansfield-Dirksen Substitute by a vote of 76-18. 110 Cong. Rec. 14239 (June 17, 1964). On June 19, 1964, the Senate approved the House Bill as amended by the Substitute by a vote of 73-27 and sent it to Conference. 110 Cong. Rec. 14511 (June 19, 1964).

That definition of "employer" was ultimately enacted in the precise form discussed by Senator Dirksen. Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964).

Thus, the legislative history of Title VII pointedly and strongly shows the legislative intent to focus on the employment relationship in counting employees toward the jurisdictional minimum. In turn, this requires the use of the payroll method.

4. The day-by-day method is explicitly contrary to the general legislative purposes underlying Title VII -- that of extending Title VII's prohibitions as far as possible without imposing undue expense and burden on small businesses unable to bear that cost.

That Congress intended to limit the reach of Title VII is apparent from the textual definition of employer, limited as it was to twenty-five employees. It is the purpose behind that limitation that bears examination.

Petitioner Darlene Walters respectfully submits that only the payroll method is consistent with the general tenor of Title VII's legislative history showing that Congress intended to reconcile important competing purposes -- extending the protections of Title VII to the broadest possible number of businesses and employees in such a manner as to ensure easy

enforcement, all without imposing its attendant costs on small entities truly unable to withstand those costs financially.

Three legislative concerns emerge from the debates on Title VII. The first and foremost was the threat to the associational rights of small business owners. Senator Cotton argued that for small businesses, "the personal relationship is predominant" and that a small businessman should "be allowed to pick and choose employees congenial to himself." 110 Cong. Rec. 13085-86 (June 9, 1964) (remarks of Senator Cotton). A second theme advanced by Senator Cotton was that small entities should not be burdened with the costs associated with litigating discrimination claims. *Id.* at 13092. His third concern was "the problem of enforcement" -- that if the EEOC was required to investigate every complaint against small businesses across the country "enforcement would become well nigh impossible; and the enforcement which did occur would be found to be spotty." *Id.* at 13085.

The proponents of Title VII argued that it had been molded to reach the largest number of employees and that raising the employee minimum to 100 would emasculate it. *Id.* at 13087 & 10389 (remarks of Senators Dirksen and Humphrey). They argued that the costs of litigating discrimination complaints was justified by the principle of eradicating discrimination, "a price one has to pay to be free." *Id.* at 13092 (remarks of Senator Morse). Finally, they argued that the concerns about enforcement were dealt with by the mechanism of apportioning investigative and conciliative responsibility between the state and federal equal employment agencies. *Id.* at 13087 & 13089 (remarks of Senators Dirksen and Saltonstall).

Of course, Senator Cotton lost. The Senate overwhelmingly rejected his concerns about the personal relationship, problems of enforcement and the costs of defense.

And, of course, " '[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981), (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)).

Yet, reference to Senator Cotton's concerns is useful because they show that it is the day-by-day method that fulfills all his worse fears and objections. Indeed, as petitioner will demonstrate in the next section, the day-by-day method flushes the specter of Senator Cotton's parade of horribles with new life contrary to the explicit wishes of the great majority of Senators who approved Title VII.

5. Whereas the payroll method is quick and easy to apply, the day-by-day method is difficult, cumbersome and time-consuming and results in irrational distinctions between employees.

a. The payroll method is easy and swift of application.

The payroll method is quick and easy to apply.

In this case, Metropolitan prepared biweekly payroll records for its employees which it sent to an outside payroll service for processing. Examples of Metropolitan's payroll records are included in the Joint Appendix at JA 13A & 14A. They are simple and easy to read. They show that Metropolitan employed fifteen employees for the payroll period ending March 9, 1990, a Thursday. *Id.* It takes seconds to count the fifteen employees. With the payroll registers for the other weeks of the year, the count of employees consumes no more than a couple of hours, even though Metropolitan's payroll period did not coincide with the calendar week. No further agonizing tabulations or counts are required.

In general, the payroll method will be easy to apply in virtually all cases. The jurisdictional count can be made quickly, based on regular payroll records, already required by the income, payroll, unemployment and social security tax reporting and withholding obligations imposed on employers by federal, and most state, tax laws.

b. The day-by-day method is a morass.

This Court has received this case with a streamlined record, based in large measure on simple stipulations. Central to those stipulations are the attractive spreadsheets in shaded columnar format showing the work history of every one of Metropolitan's employees in 1990. (Stips. JA 28-79). The ready format of these spreadsheets should not conceal the difficulties of the day-by-day method. In fact, the work required by the day-by-day method was excruciating.

To reach those Stipulations, the parties were required to examine daily time cards and other payroll records for between thirteen and seventeen full-time and part-time hourly employees for every day of 1990 to determine their employee status (full-time or part-time), presence at work, leave status (paid or unpaid) and the other cumbersome attributes emphasized by the day-by day method.

In theory, the minimum jurisdictional threshold for one year requires examination of 1500 daily working histories (15 employees times 5 working days per week times 20 weeks). In a case like this one, in which the jurisdictional count was short, there would necessarily be a tabulation for the entire year of daily working histories -- a total of 3900 records (15 employees times 5 weekly working days times 52 weeks). In this case, for various additional reasons, the parties examined the work history of every employee for every day of the year, including

weekends -- approximately 5400 daily working histories.

All those figures are doubled because tabulation of two years of working history will often be required. In fact, in this case, respondents did a two year analysis -- 1989 and 1990 -- and produced their own spreadsheet weekly tabulations for both years, tabulations that proved to be significantly incorrect. (*See* discussion supra, notes 4 & 5, pp. 6 & 8). Thus, respondents and their counsel were required to do their own detailed tabulations and then redo them all over again to reach the stipulations. Surely that repetitious work and the resulting delays and expense were as undesirable for respondents as they were for petitioners and the district court.

Moreover, the detailed analysis required by the day-by-day method involves a series of complicated and sometimes raw and indecipherable records -- time cards, payroll sheets, and sick leave and vacation records.

Finally, even though the analysis was undertaken by agreement of counsel working together to produce usable stipulations for the district court, the effort still took almost ten months, from the August 13, 1993 filing of Metropolitan's Motion to Dismiss until the June 6, 1994 filing of the Stipulations. (*See* Dist. Ct. Dkt. Entries Nos. 25 & 37, JA 2 & 4-5). The parties repeatedly requested and were granted extensions of time by the district court. (*See* Dist. Ct. Dkt. Entries Nos. 32-36, JA 3-4). Had the parties contested the jurisdictional count, thus requiring the trial court's resolution of factual issues about daily work histories, the case would no doubt have been delayed even longer perhaps embroiling the district court in an agonizing and overwhelming counting exercise. With the increasing caseloads in the EEOC and federal courts, the imposition of such inordinate analysis is unwise in the extreme.

A line must be drawn somewhere. Some sort of test or method of counting must be devised. The payroll test is the obvious choice because it fulfills the clear legislative purpose of maximizing Title VII's protections in an inexpensive, swift procedure that is easy to apply.

c. The day-by-day method imposes greater costs on respondent employers because of the fee shifting provisions of Title VII.

Moreover, in some percentage of the cases, it will be the employer defendants who will bear the total burden of inordinate cost.

Prevailing plaintiffs are entitled to recover attorneys' fees and costs from defendants in all but special circumstances, whereas a prevailing defendant only recovers fees if the Title VII plaintiff's action was frivolous, unreasonable or without foundation or brought in bad faith. 42 U.S.C. § 2000e-5(k); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423 (1978). Thus, in those cases where jurisdiction is found and the plaintiff prevails on the merits, a defendant will pay the plaintiff's fees incurred in establishing that jurisdiction, whereas a prevailing defendant will be required to meet more stringent standards to win fees from a losing plaintiff. *Compare Pedreyra*, 465 F. Supp. at 952 (plaintiff establishing jurisdiction and discrimination entitled to attorneys fees), *with Evans v. Davie Truckers, Inc.*, 769 F.2d at 1014 (affirming refusal to award fees to defendant who won on merits after being found to be an employer).

Of course, respondent employers would no doubt prefer to escape a Title VII action on jurisdictional grounds rather than litigate on the merits. But surely respondent employers desire

an efficient and inexpensive method of determining whether or not they are covered by Title VII in the first place, and whether they are within the jurisdiction of the EEOC and federal courts in the second. But most assuredly, respondent employer do not want to lose an expensive and protracted jurisdictional inquiry, only to pay the costs and fees incurred by the plaintiff in that inquiry when and if the plaintiff thereafter prevails on the merits.

Thus, the day-by-day test results in an unbalanced apportionment of costs, a totally undesirable consequence from the defendant's perspective, a consequence that does not exist under the easy and swift payroll method.

6. The day-by-day method unsettles the construction of closely related anti-discrimination schemes which contain precisely the same phrase "for each working day."

As noted above, the phrase "for each working day" is contained in three other federal anti-discrimination statutes. ADEA, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (Pet. App. 24a), FMLA, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993) (Pet. App. 28a), and ADA, 42 U.S.C. § 12111(5)(A) (Supp. V 1993). *See* discussion *supra*, pp. 16-17.

In the case of the FMLA, the most recently enacted of those statutes, Congress explicitly stated its intention that "for each working day" be construed under the payroll method. Both the House and Senate Committee Reports quote the "for each working day" language from Title VII, and then explain that as included in the FMLA the phrase "is intended to mean 'employ' in the sense of maintain on the payroll." House Committee on Education and Labor, Family and Medical Leave

Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 33 (1993); and S. Rep. 103-3, 103d Cong., 1st Sess. at 21-22 (1993) *reprinted in* 1993 U.S.C.C.A.N. 23-24.

Moreover, the Department of Labor has explicitly included that method in its regulations implementing the FMLA: "Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. Part 825, § 825.105(b)). (Supp. Pet. App. 1a-2a) As noted above, those regulations also explicitly recognize midweek employment changes as reflective of the payroll method. (*See* Argument Section 2.c *supra* p. 24-25).

It is difficult to see how the courts could construe the FMLA under the day-by-day method given its explicit legislative history and administrative construction. If Title VII is construed in this case under the day-by-day method, the lower courts, the EEOC, employees and employers will be faced with a senseless difference between identical statutory definitions in closely related anti-discrimination schemes.

The court of appeals refused to deal with this looming conflict on the grounds that while subsequent Congressional action can justify abandoning statutory precedent, the FMLA legislative history was just that -- legislative history -- and was "not akin to legislative action," and because the FMLA was not involved in this case. 60 F.3d at 1228-30 (Pet. App. at 8a-9a & 11a).

That rationale is wholly unsatisfactory. It is difficult to understand how Congress could have taken any other course in

enacting the FMLA. Congress obviously concluded that the phrase "for each working day" required the payroll method of implementation. It said so in its Reports. Had it altered that phrase in the FMLA, for example, to specify that it applied "to all employees on the payroll irrespective of their presence at work," that change would have been construed as a concession that Title VII and the ADEA did not require the payroll method because that additional clarifying language is not in those statutes. Thus, Congress chose the only principled method of ensuring uniformity of construction of identical language in similar statutory schemes -- clarification in the legislative history.

"[A] principle of statutory construction can endure just so many legislative revisitations . . . ." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Where subsequent developments in the law -- either through the growth of judicial doctrine or further action by Congress -- have removed or weakened the conceptual underpinnings of a prior rule, or rendered it irreconcilable with competing legal doctrines or policies, its abandonment is fully justified. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

All those factors are present here: There is a strong line of court decisions adopting the payroll method; Congress has explicitly approved that method in a subsequent act; and the adoption of the day-by-day would drastically unsettle the construction of other statutory schemes with consequent confusion for all touched by those schemes. Simply by adopting the payroll method, this Court can bring "coherence and consistency" to this important area of the law, avoiding

future complications arising from statutory conflict.[11] *Id.*

7. The day-by-day method strongly detracts from Title VII's purpose of extending the prohibitions against employment discrimination as far as possible.

Finally, petitioner respectfully submits that the day-by-day method is contrary to the Congressional purpose of extending the prohibitions against employment discrimination as far as possible. That purpose rings out clearly from the text of the statute's prohibitions, discussed above, as well as from the 1964 Senate debates preceding Title VII's enactment (*See* Argument, Section 3, *supra*, p. 31-38), and from the 1972 reduction of the employee minimum to fifteen. (*See* Argument, Section 3.b, *supra*, p. 31-32 and accompanying note 9). This Court affirmed that purpose in a slightly different statutory context in *Griggs v. Duke Power Co.* 401 U.S. 424, 429-30 (1970) (Objective of Congress in enacting Title VII is plain from the language of the statute -- to achieve equality of employment opportunity and remove barriers based on impermissible categories.).

Three of the persuasive lower court decisions adopting the payroll method stress that as remedial legislation, Title VII

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[11] The distracting potential for cases presenting the construction of the phrase is typified by this Court's visitation and revisitation of the task of defining the term "employee" in other federal statutes. *Compare Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (ERISA); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (Copyright Act); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (National Labor Relations Act). *See also Holly Farms Corp. v. NLRB*, 64 U.S.L.W. 4269 (April 23, 1996) (National Labor Relations Act).

should be given the broadest possible interpretation consistent with its humanitarian purpose. *Thurber*, 717 F.2d at 634-35; *Pedreyra*, 465 F. Supp. at 941; and *Pascutoi*, 11 FEP Cases at 1326-27. *See also Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (Remedial civil rights laws should be construed generously to further their primary purpose.) Yet, the day-by-day method substantially derogates that purpose by limiting the reach of Title VII's prohibitions.

This case involves allegations that Ms. Walters was denied a promotion because of her gender -- a serious charge to be sure. But even graver is the charge that respondents fired Ms. Walters in retaliation for her original EEOC filing of that discrimination charge. The day-by-day method provides the escape route from responsibility for those serious charges, frustrating Title VII's overriding purpose. To combat such shenanigans in the workplace, the reach of Title VII should be extended as far as possible.

In *EEOC v. Commercial Office Products Co.*, another Title VII case, this Court held that it "need not and should not countenance" " 'absurd or futile results . . . 'plainly at variance with the policy of the legislation as a whole' " 486 U.S. 107, 120-21 (1988) (quoting in part *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940) and *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). That longstanding canon of construction should apply here as well. The day-by-day method's absurd and futile results are plainly a variance with Title VII's policy and should not be countenanced.

8. Petitioner Walters adopts the deference arguments of petitioner EEOC.

Finally, petitioner Darlene Walters urges the Court to follow the arguments of the EEOC requiring judicial deference to the EEOC's interpretation of Section 701(b), and adopts those arguments as her own.

CONCLUSION

Petitioner Darlene Walters respectfully asks this Court to reverse the judgement of the Seventh Circuit, to find that Metropolitan was an employer within the meaning of Section 701(b) of the Title VII of the Civil Rights Act of 1964, and to remand this case to the lower courts for full proceedings on the merits.

Respectfully submitted,

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